90-1070

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Supreme Court, U.S.
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No. 90-___

In The

# Supreme Court of the United States

October Term, 1990

BALBINO JIMENEZ GARAY,

*Cross-Petitioner,*

vs.

CARNIVAL CRUISE LINES, INC.,

*Cross-Respondent.*

**Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## CROSS-PETITION FOR CERTIORARI (RULE 19.5) OF CROSS-PETITIONER BALBINO JIMENEZ GARAY

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## QUESTIONS PRESENTED UNDER RULE 19.5*

1. WHETHER A FINDING BY THE JURY THAT CROSS-PETITIONER (SEAMAN) WAS NOT PROVIDED WITH PROMPT AND ADEQUATE MEDICAL CARE CONSTITUTED A BREACH OF THE SHIPOWNER'S DUTIES PURSUANT TO THE JONES ACT.

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* This cross-petition is a companion to No. 90-875, a petition for writ of certiorari by cross-respondent here, seeking review of the same Court of Appeals judgment. Cross-petitioner as respondent in No. 90-875 is filing a brief in opposition to granting the writ; however, should the Court grant the writ, cross-petitioner requests the Court grant the cross-petitioner's writ.

## PARTIES TO THE PROCEEDING

Parties to the proceedings are accurately set forth in the initial Petition for Writ of Certiorari. For the convenience of the Court, Cross-Petitioner hereby sets forth the names as set forth in the Petition for Writ of Certiorari:

UUSI TELAKKAYHTIO OY
Masa Yards Inc.
Carnival Crystal Palace Hotel Corporation Limited
Carnival Leisure Industries Limited
Carnival's Crystal Palace, U.S., Inc.
Experience The Bahamas Limited
Carnicon Lucaya Management Associates Limited
Carnicon Nevada Management Associates
Carnicon-Aruba Management Associates
Carnicon Management Associates
Carnicon St. Lucia Management Associates
Carnicon Development Company
Carnicon-Venezuela Hotel Consultants, L.C.
Carnicon Puerto La Cruz, C.A.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the 11th Circuit is reported at 904 F. 2d 1527 (11th Cir. 1990) and appears in the Appendix to the Brief of Petitioner's Petition for Writ of Certiorari. (Cross-Petitioner will make reference to the Appendix to the Brief of Petitioner's by use of the symbol "App.", followed by the appropriate page number).

The decision of the United States District Court for the Southern District of Florida is reported at 716 F.Supp. 1421 (S.D. Fla. 1989) and is also contained in the Appendix to the Petitioner's Petition for Writ of Certiorari.

## JURISDICTION

The jurisdiction of this Court to review the judgment of the 11th Circuit is invoked under 28 U.S.C. § 1254(1), and Rule 19.5. The Court's jurisdiction was timely invoked in No. 90-875 by the filing of that petition within 90 days of the date the petition for rehearing the clarification of *Garay*, and the suggestion of en banc consideration and petition for rehearing of *Carnival*, was denied by the court below.

Cross-Petitioner received the petition on December 3, 1990. Thus, although the cross-petition would be untimely, since it was not filed within the 90 days period for filing a writ, the cross-petition is timely because it was filed within 30 days after receipt of the petition on December 3, 1990.

## STATEMENT OF THE CASE

As is set forth in the Opinion of the 11th Circuit Court of Appeals, the Cross-Petitioner prevailed on one of his claims, the claim for failure to provide prompt and adequate medical treatment. (App. 4). The jury awarded $275,000.00 in damages for the negligent failure to provide prompt and adequate medical care. (App. 6).

The District Court judge granted Carnival Cruise Lines (Cross-Respondent), motion for judgment notwithstanding the verdict with respect to the finding of failure to provide prompt and adequate medical treatment. (App. 4).

The 11th Circuit Court of Appeals, in concluding that the trial judge should have granted a directed verdict on the defense of wilful misconduct with respect to the Cross-Petitioner's (Seaman) claim for maintenance and care, did not reinstate the jury's finding of failure to provide proper and adequate medical treatment. The 11th Circuit Court of Appeals concluded that the Cross-Petitioner never raised a claim under the Jones Act for failure to provide maintenance and cure.[1] (App. 15).

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[1] Although the Court held that Cross-Petitioner had waived a claim under the Jones Act for failure to provide maintenance and cure because it was not presented below, the Court did remand for maintenance and cure damages. The Cross-Petitioner interprets the decision below as entitling Cross-Petitioner an opportunity to recover complete maintenance and cure damages, including compensatory damages for

(Continued on following page)

## REASONS FOR GRANTING CROSS-PETITIONER'S WRIT

### THE 11TH CIRCUIT COURT OF APPEALS FAILED TO RECOGNIZE THAT A FAILURE TO PROVIDE PROMPT, PROPER AND ADEQUATE MEDICAL CARE IS A BREACH UNDER THE JONES ACT.

In the decision of the 11th Circuit Court of Appeals, the Court states:

> "Garay sued Carnival on the basis of maintenance and cure, and Jones Act negligence (including the claim for failure to provide adequate treatment) and unseaworthiness". (App. 4).

The 11th Circuit Court of Appeals further sets forth in the opinion that the jury found for Plaintiff on his failure to provide prompt and adequate treatment claim. (App. 4). The jury awarded $275,000.00, (App. 6).

However, the 11th Circuit Court of Appeals declined to reinstate the jury's finding of failure to provide prompt, proper and adequate medical treatment. The Court stated (Cross-Petitioner submits incorrectly) that Cross-Petitioner (Garay) had not presented a Jones Act failure to treat claim:

> "Having concluded that Garay was entitled, as a matter of law, to maintenance and cure, it is for the trier fact to determine the amount due. Once

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(Continued from previous page)

the failure to provide maintenance and cure. However, Cross-Petitioner still believes that the 11th Circuit Court of Appeals erroneously concluded that the jury's finding of a negligent failure to provide prompt and adequate medical care was not a breach under the Jones Act.

> the shipowner was under the duty to supply maintenance and cure, the *shipowner's failure to comply could have been a breach under the Jones Act. That theory, however, was neither argued to the jury nor presented by the plaintiff's requested instructions*; we decline to remand for a trial of an issue that was neither presented to the initial jury, nor presented to us on appeal". (App. 15).

Cross-Petitioner filed a Petition for Rehearing and Clarification pointing out to the Court below that a Jones Act Claim had not only been presented below, but decided by the jury in favor of Cross-Petitioner. (A copy of the Petition for Rehearing and Clarification is attached to this Brief as a Supplemental Appendix (SA)).

The Court below denied the Petition for Rehearing and Clarification. (App. 24).

As indicated by the Court below, the jury was given a special verdict interrogatory question with respect to the failure to provide prompt and adequate medical treatment claim. The jury found that there was no Jones Act negligence with respect to how the initial accident occurred, and found no unseaworthiness.

It is well established that a shipowner's failure to provide prompt, proper and adequate medical care constitutes negligence under the Jones Act. *Cortes v. Baltimore Insular Lines, Inc.*, 287 U.S. 367, 53 S. Ct. 173 (1932); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981); *DeCerteno v. Gulf Fleet, Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986); *Perez v. Marine Transport Lines, Inc.*, 661 F.2d 254 (1st Cir. 1979).

The 11th Circuit Court of Appeals failed to recognize that the claim for failure to provide prompt and adequate

medical treatment arises under the Jones Act, and that the proper procedure was to provide a special interrogatory question to the jury with respect to that claim. In *Joyce*, the Court held it was an error to combine the seaman's slip and fall claim with his alleged failure to provide prompt and adequate medical care claim. The Court stated at page 685, which reasoning is applicable to the instant case:

> ". . . . The charge to the jury in this case, however, combined the slip and fall claim with the alleged failure to provide prompt medical assistance. This was error. It is possible for a jury to find that the initial injury resulted entirely from the seaman's own negligence, while at the same time assessing damages for aggravation of that injury based on the shipowner's post-accident omissions. . . . Similarly, the extent of each party's comparative fault may differ under each claim for relief".

Thus, the Court in *Joyce* concluded:

> "In sum, we hold that the Court erred in not submitting separate instructions and in not requiring separate findings as to each claim for relief", *Id.* at 685.

In the instant case, Cross-Petitioner followed the dictates of *Joyce* and submitted separate jury instructions and a separate interrogatory question regarding the failure to provide prompt, proper and adequate medical treatment. That procedure was not objected to below. The verdict form contained the following questions regarding the failure to treat claim:

> "Did Carnival Cruise Lines, Inc., negligently fail to provide Balbino Jimenez-Garay with prompt and adequate medical care which was a legal

> cause of his suffering *additional* pain, *additional* disability, or prolong recovery from his January 23, 1985 injuries"?

With respect to the damages, the verdict form asked the following question:

> "Please state the amount of damages in dollars suffered by Balbino Jimenez-Garay for any additional pain, disability, or prolonged suffering as a result of any failure by Carnival Cruise Lines, Inc., to promptly provide him with adequate medical care. $_____".

As previously stated, a jury returned the verdict of $275,000.00 with respect to this claim.

Thus, Cross-Petitioner submits that the 11th Circuit Court of Appeals decision failed to follow the precedent of this Court and the other circuits which clearly establish that the failure to provide prompt and adequate medical care constitutes negligence under the Jones Act.

Accordingly, the jury's verdict below should have been reinstated upon the Court's determination that Cross-Petitioner was entitled to maintenance and cure as a matter of law.

## CONCLUSION

The Court is respectfully urged to grant the Cross-Petition if any question presented by the Petition is deemed worthy of consideration.

Respectfully Submitted,

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BALBINO JIMENEZ GARAY,

Plaintiff/Appellant,

vs.

CASE NO.: 89-5319

CARNIVAL CRUISE LINE, INC., ET AL.,

Defendants/Appellees.

_____/

PETITION FOR REHEARING AND CLARIFICATION

Plaintiff/Appellant, BALBINO JIMENEZ GARAY, hereby petitions this Court for a rehearing and clarification of the Court's Decision dated July 10, 1990, and would respectfully submit, in the opinion of the Petitioner, that:

This honorable Court has overlooked or misapprehended points of law or fact regarding the effect of this Court's decision that Appellant/Plaintiff was entitled to a directed verdict on the defense of willful misconduct.

Petitioner would submit that, this Court having determined that Appellant/Plaintiff was entitled to a directed verdict on the willful misconduct defense, that the jury's award of $275,000.00, based on the jury's finding that the Defendant negligently failed to provide prompt and adequate medical care to the Appellant/Plaintiff, which was a legal cause of his suffering *additional* pain, *additional* disability, or prolonged recovery from his January 23, 1985 injuries, must be reinstated.

Petitioner would submit that the Court misapprehended or overlooked the proceedings below in which Appellant/Plaintiff clearly asserted a claim for negligent failure to provide prompt and adequate medical care; that such a claim was submitted to the jury, and the only reason the trial judge determined that there was insufficient evidence to support the jury's finding was based on the jury's determination that Appellant/Plaintiff was not entitled to maintenance and cure until he reached maximum medical cure, based on the finding of willful misconduct. Since this Court has held that willful misconduct was not a bar to Appellant/Plaintiff receiving maintenance and cure until he reached maximum medical cure, the inescapable conclusion is that the jury's verdict of $275,000.00 should stand.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING AND CLARIFICATION

The starting point should be Plaintiff's Complaint. Plaintiff's Second Amended Complaint is contained in the Appellant's record excerpts at pages 8 through 15. At pages 14 and 15, Plaintiff includes a Count for failure to provide Plaintiff with prompt and adequate medical care since his accident in Honduras, and alleges that such failure aggravated his injuries and caused him additional pain and disability.

The Defendants answered Plaintiff's Second Amended Complaint, merely denying the allegations. (See record excerpts of Appellant at pages 19 and 20).

At page 57 of the Appellant's record excerpts, the jury instruction concerning Plaintiffs' failure to treat claim is set forth:

> Plaintiff's fourth claim against Defendant is for failure to provide prompt, proper and adequate medical attention.
>
> If you find that Defendant failed to promptly provide the Plaintiff with proper and adequate medical care and this failure contributed in any manner to Plaintiff suffering additional pain, disability or prolonged recovery, then you should award damages to the Plaintiff for the aggravation portion only of the Plaintiff's injuries due to the delay. This is a separate claim for damages and these damages should not duplicate damages awarded under the Plaintiff's claims for negligence, unseaworthiness and/or maintenance and cure, if any.

Defendant did not object on the basis that it was improper to have a separate Court for failure to treat, separating this claim from the Jones Act Negligence with respect to how the initial accident occurred. In fact, such an objection would have been without merit. In *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir. 1981), a case cited by the Appellee, the Court held it was error to combine the seaman's slip and fall claim with his alleged failure to provide prompt medical care claim. The Court stated at page 685, which reasoning is applicable to the instant case:

> The charge to the jury in this case, however combined the slip and fall claim with the alleged failure to provide prompt medical assistance. This was error. It is possible for a jury to find that the initial injury resulted entirely from the seaman's own negligence, while at the same

> time assessing damages for aggravation of that injury based on the shipowner's post-accident omissions . . . Similarly, the extent of each party's comparative fault may differ under each claim for relief.

Thus, the Court in *Joyce* concluded, at page 685:

> In sum, we hold that the court erred in not submitting separate instructions and in not requiring separate findings as to each claim for relief.

Thus, in the instant case, it was totally proper, and required, for the Appellant/Plaintiff to separate his claim for failure to provide prompt and adequate medical treatment. The verdict form contained the following question regarding Plaintiff's failure to treat claim:

> Did Carnival Cruise Lines, Inc. negligently fail to provide Balbino Jimenez Garay with prompt and adequate medical care which was a legal cause of his suffering *additional* pain, *additional* disability, or prolonged recovery from his January 23, 1985 injuries?
>
> (See Appellant's record excerpts at page 71) (emphasis supplied)

The verdict form also contained the following question, which us set forth at page 72 of Appellant's record excerpts:

> Please state the amount of damages in dollars suffered by Balbino Jimenez Garay for any additional pain, disability, or prolonged suffering as a result of any failure by Carnival Cruise Lines, Inc. to promptly provide him with adequate medical care $___.

Defendants did not object to the verdict form, or the fact that Plaintiff separated his claim for failure to treat.

Instead, the objection by the Defendant below was that the jury should be instructed that if they determined that Plaintiff's injuries were due solely to his own willful misconduct, that they should not answer any questions with respect to Appellant/Plaintiff's failure to treat claim. This argument was based on Defendant's contention that if there was no duty to provide maintenance and cure until Plaintiff/Appellant reached maximum medical cure, then the Plaintiff/Appellant would not have a failure to treat claim since his entire claim was based on Defendant abandoning Plaintiff prior to him having reached maximum medical cure. Plaintiff's counsel suggested, and the court agreed, to allow the jury to answer the failure to treat question notwithstanding the determination on the willful misconduct issue, deciding that the Court could rule on the issue post-trial as a matter of law.

The jury then determined that Plaintiff's injury was solely due to his own willful misconduct, but found that the Defendant had negligently failed to provide Plaintiff with prompt and adequate medical care. The record on appeal is clear that Plaintiff never claimed any failure to provide prompt and adequate medical care with respect to the initial treatment, but rather that the claim was based on Defendant's abandonment of Plaintiff prior to him having reached maximum medical cure. This was argued to the jury in closing argument by Plaintiff's counsel.

## WHY THIS COURT'S OPINION MISAPPREHENDS OR OVERLOOKS THE EFFECT OF THE DETERMINATION THAT WILLFUL MISCONDUCT WAS NOT A DEFENSE TO PLAINTIFF'S MAINTENANCE AND CURE CLAIM

As this Court stated in its Opinion: Garay sued Carnival on the basis of Maintenance and Cure, Jones Act Negligence (including a claim for failure to provide adequate treatment) and Unseaworthiness.

This Court's Opinion further recognizes:

> The jury found for the plaintiff only on its claim that the ship failed to provide him with prompt and adequate treatment.

The Court's Opinion sums up *Garay's* failure to treat allegations at page 3620:

> Finally, he alleged that Carnival failed to provide prompt and adequate medical attention, and that such failure had aggravated his injuries. The jury found against Garay on the negligence and unseaworthiness claims. Further, the jury found that his injuries were the result of his own willful misbehavior, thus disentitling him to maintenance and cure. Finally, however, the jury found for the plaintiff in the amount of $275,000.00 to compensate him for Carnival's negligent failure to provide Garay with prompt and adequate medical care, which failure caused him additional pain and disability, or prolonged his recovery.

The Court's Opinion then summarizes the District Court's ruling on post trial motions:

> The District Court granted the Defendants' Motion for JNOV on the failure to treat claim, on the ground that there was no support for the claim under the law or the evidence provided; insofar as Garay alleged negligent treatment,

there was no evidence to support the claim; and insofar as he alleged that he was discharged before attaining maximum medical improvement, that allegation did not state a claim under the failure to treat doctrine as the shipowner had no duty to treat to the point of MMI.

It is clear from analyzing the District Court's Order on the Post Trial Motions (Final Judgment Notwithstanding the Verdict) that the setting aside of the jury's verdict for negligent failure to provide prompt and adequate medical care was based on the trial judge's determination that Carnival Cruise Line did not have a duty to provide medical care up until the time the Plaintiff reached maximum medical cure. Thus, it would follow that there was no support for the jury's finding if there was no duty.

However, this Court has held that Carnival Cruise Lines did have a duty to provide medical care to the Plaintiff to the point of maximum medical cure. Ergo, the jury's verdict is supported based on the reasoning of the trial judge, and based on this Court's reasoning in its Decision.

In the Judgment Notwithstanding the Verdict, the trial judge states that Defendants' Motion for Judgment Notwithstanding the Verdict argues that Plaintiff cannot recover for failure to treat where there is no liability for maintenance and cure because of willful misconduct (Appellant's record excerpts page 24). The trial judge also recognized that a seaman can recover for additional injuries caused by a shipowner's unreasonable failure to treat or to provide prompt medical care, citing *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676 (10th Cir 1981).

However, the trial judge concluded that the shipowner's duty to provide prompt medical care did not require it to treat Plaintiff until he reached maximum cure since the jury had found that Plaintiff's injuries were due to his own willful misconduct.

Since the jury had determined that the Defendant did not owe a duty to provide medical care to the Plaintiff until he reached maximum medical cure, the trial judge held that the Plaintiff had not shown "some form of negligence or breach of some other duty." (Appellant record excerpts p. 26).

Had the Defendant in fact had the duty to treat the Plaintiff until he reached maximum medical cure, then Plaintiff did demonstrate a breach of a duty, thus constituting negligence.

As this Court correctly states at page 3625 of the Opinion:

> Unless Carnival had a duty, however, to provide further medical treatment, the refusal to continue treatment was no breach. . . .
>
> Once the shipowner was under a duty to supply maintenance and cure, the shipowner's failure to comply could have been a breach under the Jones Act.

The trial judge concluded that reasonable minds could not find that the Plaintiff did not receive prompt and adequate medical attention; thus, the Court set aside the jury's failure to treat claim. However, this was based on the Court having determined that the Defendant did not have a duty to provide medical care until the time Plaintiff reached maximum medical cure. Since this Court

has ruled as a matter of law that the Defendant did have a duty to provide medical care until Plaintiff reached maximum medical cure, the jury's verdict is not only consistent, but also well supported by the record. The jury's finding should not be disturbed based on this Court's determination that there was no willful misbehavior defense below. The trial judge's reasoning for setting aside the verdict is no longer present.

Obviously, the trial judge determined that there was a basis for the jury to conclude there was a failure to treat claim if the Defendant had a duty to provide maintenance and cure until the time of maximum medical cure since the trial judge reserved ruling on the issue of whether the jury could find a failure to treat claim even if they determined that Plaintiff's injuries were due to his own willful misconduct. Otherwise, the Court would have directed a verdict on Plaintiff's failure to treat claim since Plaintiff never contended that the initial medical treatment was not prompt or adequate.

## CONCLUSION

In summary, this Court has overlooked that the Plaintiff did assert a failure to treat claim pursuant to the Jones Act. The Plaintiff may have separated his failure to treat claim into a separate Count, but this was totally proper pursuant to the dictates in *Joyce v. Atlantic Richfield Co., Supra*. The Defendant never objected to the Plaintiff separating the failure to treat claim into a separate Count. It was necessary to do so since Defendants' responsibility for the initial accident was hotly contested. The jury was free to find, as they apparently did, that the Defendant

was not responsible for the slip and fall claim, but was responsible for negligently abandoning the Plaintiff prior to his having reached maximum medical cure.

The only basis to have overruled the jury's verdict was that the Defendant did not have a duty to provide medical care any further since Plaintiff's injuries were caused by his own willful misconduct, thus terminating any maintenance and cure obligations. Having ruled that the willful misconduct defense was not applicable to the facts of the instant case, the jury verdict finding that Carnival Cruise Lines Inc. "negligently failed to promptly provide Balbino Jimenez Garay with prompt and adequate medical care, which was a legal cause of his suffering *additional* pain, *additional* disability, or prolonged recovery from his January 23, 1985 injuries, should be reinstated.

Although the Appellant would submit that the jury has already spoken on the failure to treat claim, and that the jury's finding is in no way inconsistent based on this Court's holding on the willful misconduct defense, Appellant would submit that at the very least, he should be entitled to pursue his failure to treat claim on re-trial. This Court did state at page 3625 of the Opinion that the trial Judge's error and failing to direct a verdict on the defense of willful misconduct rendered the subsequent jury findings unreliable. Since it is clear that Plaintiff did have a failure to treat case, albeit in a separate Count, Plaintiff would submit that he has not waived any failure to treat claim. If the Court feels the jury's finding in the failure to treat claim was tainted, then Plaintiff should be allowed to present the claim at the re-trial. However, Plaintiff submits there is nothing to demonstrate that the

jury did not properly consider the failure to treat claim, pursuant to a proper jury instruction, and proper interrogatories. The jury's finding should be reinstated.

Respectfully submitted:

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/s/ Brett Rivkind
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27th day of July, 1990, to Rodney Earl Walton, KELLEY, DRYE & WARREN, including SMATHERS & THOMPSON, 1301 Alfred I DuPont Building, Miami, Florida 33131.

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In The

# Supreme Court of the United States

October Term, 1990

BALBINO JIMENEZ GARAY,

*Cross-Petitioner,*

versus

CARNIVAL CRUISE LINES, INC.,

*Cross-Respondent.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED ON CROSS-PETITION

The Cross-Respondent Carnival respectfully submits that the decision of the 11th Circuit Court of Appeals does not raise the question presented in the Cross-Petitioner's Brief. The 11th Circuit affirmed the dismissal of Garay's failure to treat claim not because of lack of a Jones Act theory upon which to support the claim but rather because it held that the issue had not been properly preserved for review. Therefore, the Cross-Respondent Carnival respectfully restates the issue presented as it relates to this Court's discretionary jurisdiction to issue a writ of certiorari:

> WHETHER AN APPELLATE COURT SHOULD CONSIDER ISSUES FOUND NOT TO HAVE BEEN PROPERLY PRESERVED FOR REVIEW.

## PARTIES TO THE PROCEEDING

Carnival Cruise Lines, Inc. (Appellee), and Balbino Jimenez Garay, (Appellant) were parties before the United States Court of Appeals for the Eleventh Circuit. Carnival Cruise Lines, Inc. (Carnival) does not have any parent corporations. Carnival does have some subsidiaries or subsidiaries of subsidiaries which are not wholly owned by Carnival:

UUSI Telakkayhtio Oy

Masa-Yards Inc.

Carnival Crystal Palace Hotel Corporation Limited

Carnival Leisure Industries Limited

Carnival's Crystal Palace, U.S., Inc.

Experience The Bahamas Limited

Carnicon Lucaya Management Associates Limited

Carnicon Nevada Management Associates

Carnicon-Aruba Management Associates

Carnicon Management Associates

Carnicon St. Lucia Management Associates

Carnicon Development Company

Carnicon-Venezuela Hotel Consultants, L.C.

Carnicon Puerto La Cruz, C.A.

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OTHERS:

4 C.J.S. *Appeal & Error* §§ 228, 243 (1957) ..... 6, 7

## STATEMENT OF THE CASE

The Cross-Petitioner, Balbino Jimenez Garay [Garay] was a seaman on a vessel operated by the Cross-Respondent, Carnival Cruise Lines, Inc. [Carnival]. Garay suffered head injuries when he fell down the stairs on board the ship. Garay sued Carnival on the basis of claims for failure to treat, maintenance and cure (including punitive damages), Jones Act negligence and unseaworthiness.

Carnival defended the case asserting, among other things, that there was insufficient evidence to support the failure to treat claim. After his accident, Garay was immediately given medical treatment on the ship, as well as on shore at the nearest port, Puerto Vallarta, Mexico. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421, 1422 (S.D. Fla. 1989).

Garay was airlifted to California at Carnival's expense. There he received brain surgery which saved his life. For three weeks, Garay received treatment and therapy at a hospital in San Pedro, California at Defendant's expense. *Garay*, 716 F.Supp. at 1422. At the recommendation of his treating physician, Dr. Ahn, Garay returned home to his family in Honduras, accompanied by a nurse. Garay received physical therapy once every 2 weeks for the next 3 months. (Testimony of Adela Villeda). Carnival also gave Garay funds to cover maintenance for 3 months. *Garay*, 716 F.Supp. at 1422.

The jury found in favor of Carnival on the maintenance and cure claim, the punitive damages claim, the Jones Act claim and the unseaworthiness claim. The jury found in favor of Garay on the failure to treat claim but that award was set aside by the trial judge based on

Carnival's motion for judgment notwithstanding the verdict. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421 (S.D. Fla. 1989). The trial court entered judgment in favor of Carnival.

Garay appealed to the 11th Circuit. The 11th Circuit reversed the judgment in favor of Carnival on the maintenance and cure claim. The 11th Circuit ordered the case remanded to the trial court for a determination of the amount of maintenance and cure due and whether punitive damages should be awarded. The 11th Circuit, however, declined to reverse the trial court's ruling regarding the "failure to treat" claim. The appellate court held that Garay did not argue that claim to the jury on the proper theory and that Garay did not present that theory in the Plaintiff's requested jury instructions. *Garay v. Carnival Cruise Lines, Inc.*, 904 F.2d 1527, 1534 (11th Cir. 1990).

Carnival petitioned this Court for a writ of certiorari on certain issues other than the failure to treat claim. (Case No. 90-875). Garay now cross-petitions for a writ of certiorari on the failure to treat issue. Contradictorily, Garay also asserts that the 11th Circuit's decision entitles him the opportunity to recover "complete maintenance and cure damages, including compensatory damages for the failure to provide maintenance and cure" on remand to the trial court. (Cross-Petition pp. 2-3).

This, however, is an incorrect reading of the 11th Circuit's opinion. The 11th Circuit limited the remand issue to the amount of maintenance (living expenses) and cure (medical expenses). No remand was made for compensatory damages. Garay's attorneys must be aware of this or otherwise they would not have cross-petitioned on

this point. There would be no need to cross-petition if they were to be allowed to raise the "failure to treat" issue again on remand.

Carnival opposes the Cross-Petition.

## REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

### AN APPELLATE COURT SHOULD REFRAIN FROM REVIEWING ISSUES WHICH THAT COURT FOUND WERE NOT PRESENTED BELOW OR ON APPEAL.

#### A. The Cross-Petition is Contingent Only.

In the event this court denies Carnival's petition for writ of certiorari in case No. 90-875, then this Cross-Petition for writ of certiorari should also be denied. Carnival hopes that its petition for writ of certiorari in Case No. 90-875 will be granted. Garay, however, has opposed that petition.

Garay has further stated that "however, should the Court grant the writ, cross-petitioner requests the Court grant the cross-petitioner's writ." (Cross Petition p. i). Garay also states that the Cross-Petition should be granted "if any questions presented by the Petition is deemed worthy of consideration." (Cross-Petition p. 7). Therefore, it appears that the Cross-Petitioner Garay is asking for review only if Carnival's original petition is granted.

**B. The 11th Circuit's Decision Does Not Present the Question Raised in Garay's Cross-Petition.**

The 11th Circuit's opinion does not present the question presented in Garay's Cross-Petition. Garay phrases that question as follows:

> WHETHER A FINDING BY THE JURY THAT CROSS-PETITIONER (SEAMAN) WAS NOT PROVIDED WITH PROMPT AND ADEQUATE MEDICAL CARE CONSTITUTED A BREACH OF THE SHIPOWNER'S DUTIES PURSUANT TO THE JONES ACT.

It was unnecessary for the 11th Circuit to reach the issue presented by Garay's Cross-Petition because it held that the issue was waived below.

Garay's Cross-Petition states that "The 11th Circuit Court of Appeals failed to recognize that a failure to provide prompt, proper and adequate medical care is a breach under the Jones Act." (Cross-Petition pp. iii and 3). Garay's Cross-Petition ignores the fact that the very language of the 11th Circuit's opinion stated *in dicta* that there was a Jones Act cause of action for failure to pay maintenance (living expenses) and cure (medical expenses).

> A shipowner's failure to pay maintenance and cure not only give (sic) rise to a claim for maintenance and cure, but may also support a cause of action under the Jones Act for breach of the duty to provide maintenance and cure.

*Garay v. Carnival Cruise Lines, Inc.*, 904 F.2d 1527, 1533 (11th Cir. 1990).

Therefore, the 11th Circuit's opinion presents no grounds for review under the question presented in

Garay's cross-petition. There is no conflict between the 11th Circuit's opinion and any opinions of this Court.

The holding in the *Joyce* case, *infra*, cited by Garay's cross-petitioner is consistent with the 11th Circuit's opinion.

> Generally, shipowners must provide maintenance and cure to seamen injured in service of the ship. [Cases cited] On vessels lacking adequate medical facilities this duty requires the shipowner, if necessary, to promptly evacuate the injured to a hospital or put into the nearest port where treatment is available. [Cases cited] If it is established that a breach of this duty has contributed in any manner to additional pain, disability or prolonged recovery, an action for damages may be brought under the Jones Act, 46 U.S.C.A. § 688.

*Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 684 (10th Cir. 1981).

The language in the 11th Circuit's opinion therefore presents no grounds for review by this court concerning the question presented by Garay's Cross-Petition.

### C. The 11th Circuit's Holding that it Should Refrain from Reviewing an Issue Not Properly Raised Below or on Appeal is in Accord with the Law.

The 11th Circuit held that the cross-petitioner's claim was not properly raised. In discussing this point, the Eleventh Circuit stated as follows:

> Once the shipowner was under a duty to supply maintenance and cure, the shipowner's failure to comply could have been a breach under the

> Jones Act. That theory, however, was neither argued to the jury nor presented by the plaintiff's requested instructions; we decline to remand for trial of an issue that was neither presented to the initial jury, nor presented to us on appeal.

*Garay v. Carnival Cruise Lines, Inc.*, 904 F.2d 1527, 1534 (11th Cir. 1990).

This holding does not conflict with Supreme Court authority or with the authority of other circuits. It is well settled that the theory upon which the case was tried in a court below must be strictly adhered to on an appeal or review. *Indiviglio v. United States*, 249 F.2d 549, 560 (5th Cir. 1957), *rev'd on other grounds*, 357 U.S. 574, 2 L.Ed.2d 1547, 78 S.Ct. 1381 (1958), *rev'd on other grounds, Giordenello v. United States*, 357 U.S. 576, 2 L.Ed.2d 1548, 78 S.Ct. 1387 (1958).

The general rule is that a federal appellate court does not consider an issue not passed on below. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). For example, this Court has stated that a party who "sought no ruling upon the question from the Board or the lower court and is therefore not entitled to have it decided here." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498, 57 S.Ct. 569, 577, 81 L.Ed. 755 (1937).

Accordingly, if the issue sought to be raised on appeal is one which should have been submitted to the jury, a failure to request that it be submitted to the jury is deemed an abandonment thereof, and an attempt to present said question or issue on appeal is improper as it constitutes matter not raised and relied on in the court below. 4 C.J.S. *Appeal & Error* § 243 (1957). Generally,

questions of whatever nature, not raised and properly preserved for review in the trial court, cannot be raised for the first time on appeal. 4 C.J.S. *Appeal & Error* § 228 (1957). *See also Pierre v. U.S.*, 525 F. 2d 933 (5th Cir. 1976).

The Cross-Petitioner (Garay) is requesting that this court review an issue which the appellate court never reached because it determined that the issue had not been properly preserved review.

### D. The Issue Suggested by Garay's Cross-Petition is "Fact Bound" and Not Suitable for Review.

The issue suggested by the Cross-Petitioner does not involve issues of law widely applicable to other litigants. If the court accepted Garay's Cross-Petition for review, then two factual questions would have to be determined by this Court. The first factual question involves the question of waiver. This court would have to review the trial court record to determine whether or not the issue asserted by the cross-petition was properly raised below.

Even if this court (1) accepted Garay's Cross-Petition issue and (2) disagreed with the appellate court's finding that the issue was waived below, then another factual determination would need to be made. This factual determination is whether or not there was sufficient evidence to support Garay's failure to treat claim.

The trial court held that there was insufficient evidence to support this claim and ordered a judgment notwithstanding the verdict. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421 (S.D. Fla. 1989). This court has previously affirmed a directed verdict entered by a trial judge in a seaman's failure to treat case. *See De Zon v.*

*American President Lines*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943).

Carnival submits that it is not the job of this court to undertake the two factual determinations set forth above. The Cross-Petitioner Garay has failed to suggest any broad legal significance to the question presented. The U.S. Supreme Court, as a court of final review, should concentrate on legal issues and not factual ones. That is why Carnival's petition for writ of certiorari originally submitted to this court in companion case No. 90-875 focused on the legal issues, not the factual ones.

The determination requested by Garay's Cross-Petition would be relevant only to the parties involved in this case and would turn on the facts present in this case. In short, the issue presented in the Cross-Petition is "fact bound." The determination of factual issues is best left to the trial court and then to review by the intermediate appellate court. The U.S. Supreme Court should focus on the legal issues. This is particularly true where no conflict of authority exists on the question presented.

## CONCLUSION

For the reasons set forth above, the Cross-Petition for Certiorari should be denied.

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